

**IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI (COURT NO. IV)**

Company Petition No. IB 2339/ND/2019

[Under Section 9 of the Insolvency and Bankruptcy Code, 2016 Read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016]

IN THE MATTER OF:

Pradeep Kumar & Co

Amended as:

Pradeep Kumar,

(Sole Proprietor, Pradeep Kumar & Co.)

**...APPLICANT/
OPERATIONAL CREDITOR**

VERSUS

APACE BUILDERS AND CONTRACTORS PVT. LTD.

**...RESPONDENT/
CORPORATE DEBTOR**

JUDGMENT PRONOUNCED ON: 05.02.2021

CORAM:

DR. DEEPTI MUKESH

HON'BLE MEMBER (JUDICIAL)

MS. SUMITA PURKAYASTHA

HON'BLE MEMBER (TECHNICAL)

MEMO OF PARTIES

IN THE MATTER OF:

PRADEEP KUMAR & CO

Amended As:

Pradeep Kumar,
(Sole Proprietor, Pradeep Kumar & Co.)

Flat No. C-69 X3, 3rd Floor, Pocket C,

Dilshad Garden, Shahdara,

Delhi-110095.

...APPLICANT/OPERATIONAL CREDITOR

VERSUS

APACE BUILDERS AND CONTRACTORS PVT. LTD.

KH. No. 46/17, Green Avenue,

Mall Road, Vasant Kunj,

NEW DELHI-110070

CORPORATE ADDRESS:

GH-02B, Sector -1,

Greater NOIDA (west)

Uttar Pradesh - 201308

...RESPONDENT/ CORPORATE DEBTOR

FOR THE APPLICANT : Mr. Dhurabjit Saikai, Adv,

Ms. Megha Purohit, Adv.

FOR THE RESPONDENT : Mr.P.K.Sachdeva, Adv

IB-2339/(ND)/2019

Pradeep Kumar & Company Vs. Apace Builders and Contractors Pvt. Ltd.

ORDER**PER-DR. DEEPTI MUKESH, MEMBER (JUDICIAL)**

1. The Present Application is filed under Section 9 of the Insolvency and Bankruptcy Code, 2016 (for brevity 'code') read with Rules 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority), 2016 (for brevity 'the Rules') through Mr. Pradeep Kumar (for brevity 'Applicant') being the sole proprietor of Pradeep Kumar & Co., with a prayer to initiate the Corporate Insolvency process against Apace Builder Contractors Pvt. Ltd. for brevity ('Corporate Debtor').
2. The Applicant is a sole proprietor of Pradeep Kumar & Company, being the proprietorship firm having date of commencement on 03/03/2015 formed under the provision of Micro, Small and Medium Enterprise Development Act, 2006 bearing Udhog Adhaar Memorandum No. DL07A0001519 and having its office at 3rd Flat NO. C89X3, Pocket C, Dilshad Garden Shahdara, New Delhi - 110095 and registered email id pradeepkumarcompany2012@gmail.com. The applicant is involved in the business of manufacture of wooden products such as Veener Sheets, Plywood, Ribs, door frames, lamination board and wooden containers.
3. The Corporate Debtor is a Private Limited company limited by shares incorporated on 01.07.2015, under the provisions of Companies Act, 1956 bearing CIN No. U45400DL2015PTC282279 and having its registered office at KH. No.46/17, Green Avenue Mall Road, Vasant Kunj, New Delhi - 110070. The Authorized Share Capital of the company is 2,00,00,000/- (Rupees Two Crore Only) and the paid-up share capital of Rs 1,00,000/- (Rupees One Lakh Only). The corporate debtor is engaged in the business of building completion of infrastructure including activities that contribute to the completion or finishing of a construction.

4. The applicant submits that the corporate debtor approached them in the year 2018 for purchase of Wooden Door Frames, Wooden Plywood and wooden ribs of different sizes and specifications. Purchase order -I dated 20.03.2018 was issued for supply of wooden door frames. Accordingly supplies of different sizes and specifications to the satisfaction of the corporate debtor through its transport agents, i.e. Kajal Tempo Transport Service and obtained various transport receipts and E- way bills. Thereafter, the applicant raised various invoices from 21.04.2018 to 24.10.2018 against the purchase order -I. The copies of transport receipts and invoices raised are annexed with the application
5. The applicant submits that the corporate debtor again on 22.08.2018 issued purchased order – II, for supply of wooden Ply and wooden ribs of different sizes and specifications, to be sent through transport agent i.e. Kajal Tempo Transport Service and obtained transport receipts dated 22.09.2018 and E-way bills dated 22.09.2018. Thereafter the applicant raised invoice dated 22.09.2018. The copies of transport receipts and invoices raised are annexed with the application.
6. The applicant submits that during that with respect to invoices mentioned above from the period March 2018 to October 2018 and supply made thereof the corporate debtor has not made any payments. The applicant made numerous verbal communications. However, inspite of all requests of the applicant the corporate debtor neglected to make payments against the amounts due to the applicant.
7. Pursuant to the defaults, the applicant issued a demand notice dated 27.06.2017 under Section 8 of the code calling upon the corporate debtor to pay the total outstanding amount of Rs.16,72,339/- including interest calculated up to 26.06.2019. The notice was served upon the registered as

well as corporate address office of the corporate debtor via speed post. The demand notice was also sent at the registered Email ID, as mentioned in the master data vide email dated 23.07.2019. The copies of proof of delivery and tracking report of email have been annexed.

8. The corporate debtor has not replied to the said demand notice. Consequently, the applicant filed the present application under section 9 of IBC, 2016 and served the copy of this application, which was duly delivered to the Corporate Debtor as per service affidavit. As per Form V, the total debt outstanding is Rs.16,72,339/- including interest upto 26.06.2019. The applicant submits that interest will be calculated up to date of final payment.
9. The Corporate debtor filed reply to the said application and raised the following objections:
 - a) The corporate debtor raised preliminary objection with regards the maintainability of the said application that in present case the proprietorship firm is not an entity established under law. Hence is not eligible to initiate the insolvency process. The corporate debtor for this submission has relied upon the judgment of NCLT New Delhi Bench in case titled as R G Steel Vs. Berry Auto Ancillaries (P) Ltd., the said petition was dismissed and it was held that *“a sole proprietary concern taking into consideration the definition of person is not entitled to approach this tribunal on its own”*
 - b) The corporate debtor has raised an issue that supply with respect to first purchase order was not complete. Further raised issue with respect to the quality of goods and rejection of the goods against which credit notes were issued, as reflected in the ledger of applicant. Corporate debtor has denied the rate of interest charged by the applicant.

No documents in support of the contention raised by the corporate debtor are filed.

10. The applicant filed a rejoinder contravening the averments made in the reply and relied upon the following:

- a) The applicant has relied on following cases in support of contention that the sole proprietorship concern can through its proprietor file an application under Section 9 of the code.
 - i. M/S Vani Biochem Vs. M/s Vaayucom Private Limited, NCLT Amravati bench.
 - ii. M/s Rahul Engineers Vs. Ferrox Chemicals Private Limited, NCLT Mumbai Bench
 - iii. M/s Wasmake Industries Vs. M/s Utkal Builders, NCLT Cuttack Bench
 - iv. BG Textile Vs. H Sakhiya Fashion Private Limited, NCLT Ahmadabad bench

Further the applicant relying upon the judgment of NCLT, New Delhi Bench – II in the case of M/s Khera Enterprise Vs. M/s Talwar Agencies Pvt. Ltd., wherein it has been stated “*in case the application is filed by the proprietorship concern then steps be taken by the petitioner to amend the memo of parties*” submitted that they shall amend the memo of parties, hence stated that the technical objection raised by the corporate debtor shall be removed.

- b) The applicant states that no dispute was raised by the corporate debtor prior to issuance of the demand notice and relied upon the judgments of Hon’ble Supreme Court in the cases of “*Mobilox Innovations Private Limited Vs. Kirusa Software Private Limited*” and “*M/s Innoventive Industries Limited Vs. ICICI Bank & Anr.*” Further stated that in view of the above, it is clear that the dispute if any should be pre- existing and should not be

patently feeble legal argument or an assertion of fact unsupported by evidence.

- c) With respect to issuance of credit notes by the corporate director, the applicant states that allegations made by the corporate debtor are false and frivolous and the corporate debtor has failed to produce evidence to support the said contention. Further also stated that the credit notes issued were for certain goods returned which were not in terms of specifications as stated by the corporate debtor.

11. The applicant submits that in pursuance of the liberty granted by the Tribunal on 21.12.2020 an amended memo of parties was filed vide application on 28.12.2020, and further relying on the judgments of Hon'ble NCLAT in ***Neeta Saha Vs. Ram Niwas Gupta***, "*wherein it was held that the application filed by the sole proprietorship firm under I& B code are maintainable.*"
12. The applicant filed an application bearing no. IA/5734/ND/2020 for change of name of proposed IRP being Mr. Deepak Kumar Aggarwal to Mr. Arun Chadha. The consent in form 2 and certificate of registration of Mr. Arun Chadha had been filed. The said application was allowed and taken on record.
13. The date of default is 26.06.2019 and the present application is filed on 18.09.2019. Hence the application is not time barred and filed within the period of limitation.
14. The registered office of corporate debtor is situated in Delhi and therefore this Tribunal has jurisdiction to entertain and try this application.
15. The Applicant has filed its bank statement stating that the amount claimed or any part thereof, has not been received by the applicant nor had any

person, on its behalf had received in any manner the amount due to them as required u/s. 9(3)(c) of I & B Code. The Applicant has filed an affidavit in compliance of section 9(3)(b) affirming that no notice of dispute has been given by the corporate debtor relating to dispute of the unpaid operational debt.

16. The present application is filed on the Performa prescribed under Rule 6 of the Insolvency and Bankruptcy Code, 2016 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 r/w Section 9 of the code and is complete.
17. Having heard and the Ld. counsels for the parties and documents on records, it is clearly established that the default in payment of the Operational debt has occurred by the corporate debtor. Though the corporate debtor has raised dispute with regards the payments of invoices on grounds of substandard quality of goods but has not placed on record any document which proves the pre-existing dispute between the parties. There is no merit in the so-called dispute raised by the corporate debtor as mere reply filed by the corporate debtor to the present application, is unable to establish any pre-existing dispute of genuine nature. This leaves no doubt that the default has occurred for the payment of the operational debt to the applicant and the so called dispute raised by the corporate debtor is merely a moonshine dispute as laid down in “**Mobilox Innovative Private Limited vs. Kirusa Software Private Limited**”, the Hon’ble Supreme Court observed :

“It is clear , therefore that once the Operational creditor has filed an application, which is otherwise complete , the adjudicating authority must reject the application under Section 9(5)(2(d) if notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility . It is clear that such notice must bring to the notice of operational creditor the

“existence” of a dispute or the fact that a suit or arbitration proceeding relating to a dispute is pending between the parties. Therefore, all that the adjudicating authority is to see at this stage is whether there is a plausible contention which required further investigation and that the “dispute” is not a patently feeble legal argument or an assertion of fact unsupported by evidence .It is important to separate the grain from the chaff and to reject a spurious defence which is mere bluster.”

Therefore, in the given facts and circumstances, the present application is complete and the Applicant has established its claim which is payable and due by the corporate debtor. In the light of above facts and records, the present application is admitted.

18. The applicant has named Mr. Arun Chadha , as the Insolvency Resolution Professional, with registration number IBBI/IPA-001/IP-P00165/2017-18/10334, having mobile no.9810286133 and email – chadharun@yahoo.com, is appointed by this Hon’ble Tribunal as the Interim Resolution Professional subject to the condition that no disciplinary proceedings are pending against him. The specific consent has been filed in Form 2 of Insolvency and Bankruptcy Board of India (Application to Adjudicating Authority) Rule, 2016 and made disclosures as required under IBBI (insolvency Resolution Process for Corporate Persons) Regulations, 2016.
19. We direct the applicant to deposit a sum of Rs. 2 lacs with the Interim Resolution Professional, namely Mr. Arun Chadha to meet out the expense to perform the functions assigned to him in accordance with regulation 6 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Person) Regulations, 2016. The needful shall be done within one week from the date of receipt of this order by the Operational Creditor. The amount however be subject to adjustment by the Committee of Creditors, as

accounted for by Interim Resolution Professional, and shall be paid back to the Operational Creditor.

20. As a consequence of the application being admitted in terms of Section 9(5) of IBC, 2016, moratorium as envisaged under the provisions of Section 14(1), shall follow in relation to the corporate debtor, prohibiting as per proviso (a) to (d) of the Code. However, during the pendency of the moratorium period, terms of Section 14(2) to 14(4) of the Code shall come in force.
21. A copy of the order shall be communicated to the applicant, Corporate Debtor and IRP above named, by the Registry. In addition, a copy of the order shall also be forwarded to IBBI for its records. Applicant is also directed to provide a copy of the complete paper book to the IRP. A copy of this order is also sent to the ROC for updating the Master Data. ROC shall send compliance report to the Registrar, NCLT.

Sd/-
SUMITA PURKAYSATHA
MEMBER (T)

Sd/-
DR. DEEPTI MUKESH
MEMBER (J)